

1 EDELSON PC
2 Jay Edelson (*pro hac vice*)
3 Benjamin H. Richman (*pro hac vice*)
4 Alexander G. Tievsky (*pro hac vice*)
5 350 North LaSalle Street, 14th Floor
Chicago, IL 60654
Telephone: (312) 589-6370
Fax: (312) 589-6379
jedelson@edelson.com

7 ROBBINS GELLER RUDMAN & DOWD LLP
Paul J. Geller (*pro hac vice*)
8 Stuart A. Davidson (*pro hac vice*)
120 East Palmetto Park Road, Suite 500
9 Boca Raton, FL 33432
10 Telephone: 561/750-3000
561/750-3364 (fax)
11 pgeller@rgrdlaw.com

12 LABATON SUCHAROW LLP
13 Michael P. Canty (*pro hac vice*)
14 Corban S. Rhodes (*pro hac vice*)
14 140 Broadway
15 New York, NY 10005
15 Telephone: (212) 907-0700
16 Fax: (212) 818-0477
16 mcanty@labaton.com

17 | Counsel for Plaintiffs

18 [Additional counsel appear on signature page.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

21 In re FACEBOOK BIOMETRIC) Master File No. 3:15-cv-03747-JD
INFORMATION PRIVACY LITIGATION)
22) CLASS ACTION
23 This Document Relates To:) PLAINTIFFS' SUPPLEMENTAL BRIEF IN
24) SUPPORT OF MOTION FOR APPEAL
ALL ACTIONS.) BONDS
25) Judge: Hon. James Donato
26) Courtroom: 11 – 19th Floor
27) Hearing Date: Vacated pending further
order

1 Per the Court's May 24, 2021 order, Plaintiffs provide the following supplemental
 2 statement regarding the amount of the appeal bond requested in this action:

3 1. Three categories of costs are likely to be taxable against the objectors in each of
 4 these appeals: printing costs, transcript costs, and costs of securing the class's money pending
 5 appeal. Those costs will add up to far more than \$5,000.

6 2. First, the costs of printing briefs will be taxable. The Ninth Circuit typically
 7 requires seven copies of appellate briefs and four copies of excerpts of records for the court, and
 8 it allows recovery for an additional copy of each for counsel. Ninth Circuit Rule 39-1.2. At the
 9 rate of \$0.10 per page, Ninth Circuit Rule 39-1.2, Plaintiffs estimate these printing costs will be
 10 about \$100 per appeal.

11 3. Second, the costs of transcripts of the preliminary and final approval hearings will
 12 be taxable. These total \$613.60.

13 4. Finally, there is the cost of preserving the class's right to the settlement funds
 14 pending the appeal. Federal Rule of Appellate Procedure 39(e)(3) provides that the costs of
 15 "premiums paid for a bond or other security to preserve rights pending appeal" are taxable. The
 16 security at issue here is in the form of an escrow account, in which Facebook has deposited the
 17 \$650 million settlement fund. *See Int'l Telemeter Corp. v. Hamlin Int'l Corp.*, 754 F.2d 1492,
 18 1495 (9th Cir. 1985) (holding that an escrow account is a type of security that can be used to
 19 preserve rights pending appeal). The entity holding the escrow account, Citibank, charges two
 20 basis points per year (0.02%) as a monthly premium to maintain the funds. (Exhibit 1.) The
 21 amount in escrow for the benefit of the class plus the 15% holdback of attorneys' fees
 22 (approximately \$564,366,535.74) is currently required to remain in that account until the
 23 Effective Date of the Settlement has been reached and the claims can be paid. The monthly
 24 premium paid to Citibank for holding those funds in escrow is approximately \$9,400.

25 5. The cautionary tale of *Gascho v. Global Fitness Holdings, LLC*, 875 F.3d 795
 26 (6th Cir. 2017), explains why this cost is necessary. In that case, an objector's appeal delayed the
 27 finality of the judgment approving class action settlement for nearly three years. *Id.* at 798. Class
 28 counsel did escrow the money to pay the class but took no steps to secure the funds necessary to

1 pay class counsel and the settlement administrator, which were still held by defendants. *Id.* at
 2 799. By the time the judgment was final, the money was gone. *Id.* Reversing the district court's
 3 contempt order, the Sixth Circuit determined that the defendant had "no legal obligation to
 4 conserve funds to pay class counsel and the claims administrator while the appeals were
 5 pending." *Id.* at 802. Rather, "[i]f the plaintiffs wanted to ensure that [the defendant] would be
 6 able to pay class counsel and the claims administrator, they could have insisted that [the
 7 defendant] escrow those funds during the appeals." *Id.* at 801. Nothing in the *Gascho* opinion
 8 suggests that the outcome would have been any different if it had been the class's money at
 9 stake. *See id.* at 799 ("Fortunately for the class members, the payments Global Fitness owed to
 10 them had been placed in escrow under the terms of the settlement agreement."). While Facebook
 11 does not appear to have shaky finances like the defendant in *Gascho*, taking a multi-year risk by
 12 letting any private defendant hold onto over half a billion dollars in settlement funds would have
 13 bordered on malpractice. *See generally In re Lehman Bros. Holdings Inc.*, 970 F.3d 91, 95 n.1
 14 (2d Cir. 2020) ("When it filed for bankruptcy, [Lehman Brothers] held consolidated assets of
 15 \$639 billion and liabilities of \$613 billion."); *In re Enron Corp.*, 419 F.3d 115, 118 (2d Cir.
 16 2005).

17 6. Plaintiffs recognize that Rule 39(e)(3) is more typically applied in the context of a
 18 supersedesas bond paid by a defendant to avoid immediate execution on the judgment. *See City of*
 19 *San Antonio, Texas v. Hotels.com, L. P.*, No. 20-334, 2021 WL 2144536, at *2 (U.S. May 27,
 20 2021). But the language of the rule plainly does not limit the cost recovery to bonds or other
 21 security for the purpose of obtaining a stay of execution of judgment under Fed. R. Civ. P. 62(b).
 22 Rather, it refers to any "bond or other security to preserve rights pending appeal," which, as
 23 explained above, is precisely the function of the escrow account here. Indeed, other courts have
 24 permitted similar expenses to be considered in setting an appeal bond. *See, e.g., Redwen v. Sino*
 25 *Clean Energy, Inc.*, CV 11-3936 PA (SSX), 2013 WL 12128684, at *2 (C.D. Cal. Dec. 20, 2013)
 26 (collecting cases for the proposition that "many district courts in this Circuit have interpreted
 27 Rule 7 to include increased expenses in settlement administration and administrative costs
 28

1 pending appeal"); *In re Nutella Mktg. & Sales Practices Litig.*, 589 Fed. Appx. 53, 61 (3d Cir.
 2 2014) (agreeing that "administrative costs" could be considered in setting an appeal bond).

3 7. If there were any doubt, this district's local rules are even more clear. Local Rule
 4 54-3(h) provides that "[p]remiums on undertaking bonds and costs of providing security required
 5 by law, by order of a Judge, or otherwise necessarily incurred are allowable." Here, the Court
 6 ordered that "the remaining settlement fund be distributed pro rata to claiming class members,
 7 consistent with the Settlement Agreement and as expeditiously as possible" and that "[t]he
 8 parties will comply with all other provisions of the Settlement Agreement[.]" The Settlement
 9 Agreement requires that the funds be deposited into an escrow account managed by Citibank,
 10 that the money be kept in that account until the settlement is effective and payments are made to
 11 class members, and that the costs of maintaining the settlement account be paid from the
 12 settlement fund. (Settlement Agreement, dkt. 468, §§ 1.14, 1.30, 2.1.) In other words, the
 13 payments to Citibank are costs of the providing security required by the Court's order, and those
 14 costs will be taxable in this Court if the objectors do not win their appeals.

15 8. Given that the average time to resolve a civil appeal in the Ninth Circuit is 12 to
 16 20 months, there is no reasonable possibility that the cost of maintaining the escrow account will
 17 be under \$5,000. *See U.S. Court of Appeals for the Ninth Circuit, Office of the Clerk, Frequently*
 18 *Asked Questions*, <https://www.ca9.uscourts.gov/content/faq.php> (December 1, 2019). It will
 19 likely be a six-figure sum. Nevertheless, to avoid asking for an appeal bond that might chill the
 20 appeal right of an objector (even one whose lawyer is engaged in objector blackmail), Plaintiffs
 21 limited their bond request to \$5,000. If the Court of Appeals awards costs in their favor, they will
 22 seek the full amount.

23

24

25

26

27

28

1 DATED: June 1, 2021

s/ Alexander G. Tieovsky
Class Counsel

2
3 EDELSON PC
4 JAY EDELSON*
5 BENJAMIN RICHMAN*
6 ALEXANDER G. TIEVSKY*
7 350 North LaSalle Street, 14th Floor
8 Chicago, IL 60654
9 Telephone: 312/589-6370
10 312/589-6378 (fax)

11 EDELSON PC
12 RAFEY BALABANIAN (315962)
13 LILY HOUGH (315277)
14 150 California Street, 18th Floor
15 San Francisco, CA 94111
16 Telephone: 415/212-9300
17 415/373-9435 (fax)

18 ROBBINS GELLER RUDMAN
19 & DOWD LLP
20 PAUL J. GELLER*
21 STUART A. DAVIDSON*
22 120 East Palmetto Park Road, Suite 500
23 Boca Raton, FL 33432
24 Telephone: 561/750-3000
25 561/750-3364 (fax)

26 ROBBINS GELLER RUDMAN
27 & DOWD LLP
28 PATRICK J. COUGHLIN
ELLEN GUSIKOFF STEWART
LUCAS F. OLTS
RANDI D. BANDMAN
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
SHAWN A. WILLIAMS (213113)
JOHN H. GEORGE (292332)
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: 415/288-4545
415/288-4534 (fax)

1 LABATON SUCHAROW LLP
2 MICHAEL P. CANTY*
3 CORBAN S. RHODES*
4 140 Broadway
New York, NY 10005
Telephone: 212/907-0700
212/818-0477 (fax)
5 Attorneys for Plaintiffs and Class Counsel
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28